Before the

Federal Communications Commission

Washington, D.C. 20554

In the Matter of	)	
Interpretation of the Telephone Consumer Protection Act In Light of the D.C. Circuit's ACA International Decision	)	CG Docket No. 18-152
	)	CG Docket No. 02-278
	)	
	)	

Comments of the
Restaurant Law Center

June 13, 2018

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I. INTRODUCTION AND SUMMARY

The Restaurant Law Center (the "Law Center") provides these comments on several issues related to interpretation and implementation of the Telephone Consumer Protection Act (TCPA),[1] following the recent decision of the U.S. Court of Appeals for the District of Columbia in *ACA International v. FCC*.[2]

The Law Center is a public policy organization affiliated with the National Restaurant Association, the largest foodservice trade association in the world. Nationally, the industry is comprised of over one million restaurants and other foodservice outlets employing almost 15 million people—approximately ten percent of the U.S. workforce. Restaurants and other foodservice providers are the nation's second largest private-sector employers. Despite its size, small businesses dominate the industry; even larger chains are often collections of smaller franchised businesses. The Law Center seeks to provide regulatory agencies and the courts with the industry's perspective on legal issues significantly impacting the industry. Specifically, the Law Center highlights the potential industry-wide consequences of pending regulations, such as this one, through comments on behalf of our industry. Many industry members communicate with their customers and employees by phone and by text messages, and many are or have been defendants in suits filed under the TCPA. The Law Center therefore has a strong interest in the proper interpretation and application of the statute.

The Law Center's members endeavor to provide their customers with the information they want, when and how they want it. Properly construed, the TCPA should not be a barrier to such consented-to communications. The Commission, however, has interpreted the statute in ways that will chill such beneficial communications, while arbitrarily subjecting restaurants and other legitimate businesses to liability for good-faith conduct.

Restaurants have adapted to consumers' increasing preference for tailored and timely communications via those devices by utilizing a range of innovative technologies. These methods help consumers receive the information they need when and how they want it. Among these technologies are direct advertising. In particular, many consumers prefer the convenience of direct advertisements to their wireless devices rather than those found in traditional print, radio, or television media. Such consumers may sign up to join a mobile loyalty program and receive text messages containing promotional offers, coupons, or valuable information about a retailer's products.[3]

In addition to responding to their customers' desire for new and better information services, restaurants have also responded to similar expectations from their employees. Restaurants often must rapidly communicate with large numbers of employees, such as to notify them of safety concerns, unexpected restaurant closures, or local weather warnings. Given the

[1] The TCPA is codified at 47 U.S.C. § 227. The Commission's implementing rules are codified at 47 CFR § 64.1200.

[2] *ACA Int'l, et al. v. FCC*, 885 F.3d 687 (D.C. Cir. 2018) (mandate issued May 8, 2018) (affirming in part and vacating in part *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, WC Docket No. 07-135, Declaratory Ruling and Order, 30 FCC Rcd 7961 (2015) (*2015 TCPA Declaratory Ruling and Order*)).

[3] Abercrombie & Fitch Co. and Hollister Co., Notice of Ex Parte, 2 (May 13, 2015).

ubiquity of personal mobile devices with unlimited service plans and employees' preference to carry a single device, many employers communicate with employees through their own phones.[4] Automated systems that deliver text or pre-recorded messages directly to employees thus enhance the ability of employers to disseminate this time-sensitive and vital information that ultimately benefits consumers.[5]

The Law Center urges the Commission to use the D.C. Circuit's decision as an opportunity to rationalize the dysfunctional TCPA landscape. The FCC should expeditiously resolve legal uncertainty and bring common sense back to the statute by adopting a construction of what constitutes an ATDS that conforms to the statutory language and congressional intent. Petitioners urge the Commission to promptly: (1) confirm that to be an ATDS, equipment must use a random or sequential number generator to store or produce numbers and dial those numbers without human intervention, (2) find that only calls made using actual ATDS capabilities are subject to the TCPA's restrictions, (3) find that the "Called Party" under the TCPA means the person the caller expected to reach, and (4) allow for existing methods of consumer consent revocation.

There will no doubt be additional issues that the FCC is called on to address, but this critical issue merits speedy resolution, and is a critical first step to restoring a common-sense approach to the TCPA. This will provide businesses with certainty about the equipment they may use to communicate with customers and curtail frivolous TCPA litigation. Further, holding that dialing equipment subject to the TCPA is limited as specified by Congress in the statute would "respect the precise contours of the statute that Congress enacted."[6]

In the *Omnibus Order*, the FCC determined that callers should be liable for calls or texts they unknowingly place to wrong or "recycled" numbers.[7] These communications occur when the caller receives consent from a consumer to be contacted at a given number (e.g., a consumer signs up to receive text notifications of sales or monthly payment reminder calls) but the consumer either has provided the wrong number or later gives that number up, allowing it to be reassigned. The three-Commissioner majority determined that callers should be liable for making such communications on the theory that callers lack consent from the phone number's new user. The FCC reached that conclusion notwithstanding its concessions that there exists no consistently effective means for callers to know when a number has been reassigned and that many such communications are made in complete good faith and without any intention of calling the wrong party.

The FCC half-heartedly responded to those concerns by offering a one communication, post-reassignment so-called "safe harbor." This "solution," however, does nothing to solve the problem because a caller unaware of a reassignment before that single call or text will generally remain unaware after it (for example, when no one answers the call or when the new user does

[4] Rubio's Restaurant, Inc., Petition for Expedited Declaratory Ruling, 1-2 (Aug. 15, 2014) (detailing Rubio's use of automated mobile communications for food safety notices).
[5] United Healthcare Services, Inc., Reply to Comments, 4-5 & n.13 (Mar. 24, 2014) (collecting comments).
[6] *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Declaratory Ruling and Order, 30 FCC Rcd. 7961, 8072 ("*Omnibus Order*") (Dissenting Statement of the then-Commissioner Ajit Pai ("Pai Dissent").
[7] *Omnibus Order*, ¶¶71-97.

not respond to a text). Nonetheless, the Commission stated categorically that after this single communication, the caller will be deemed to have "constructive knowledge" that the number was reassigned.[8]

If permitted to stand, the FCC's interpretations of the TCPA will harm the nation's restaurants and foodservice outlets, the consumers they serve, and the millions of people they employ.

II. THE COMMISSION SHOULD CLARIFY WHAT CONSTITUTES AN AUTOMATED TELEPHONE DIALING SYSTEM

A. The Commission Should Confirm That To Be An ATDS, Equipment Must Use A Random Or Sequential Number Generator To Store Or Produce Numbers And Dial Those Numbers Without Human Intervention

The FCC should immediately clarify that in order to be an ATDS subject to Section 227(b)'s restrictions,[9] dialing equipment must possess the functions referred to in the statutory definition: storing or producing numbers to be called, using a random or sequential number generator, and dialing those numbers.[10]

The TCPA defines an ATDS as a device that has the capacity to "store or produce telephone numbers to be called, using a random or sequential number generator; and to dial such numbers."[11] A device must be able to generate numbers in either random order or in sequential order to satisfy the definition. Otherwise, the device cannot do anything "using a random or sequential number generator."[12] Next, it must be able to store or produce those numbers called using that random or sequential number generator. This ability to store or produce telephone numbers to be called, alone, is insufficient; the clause "using a random or sequential number generator" modifies this phrase, requiring that the phone numbers stored or produced be generated using a random or sequential number generator. Finally, the device must be able to dial those numbers.

The Commission should not deviate from this straightforward language. Devices that cannot perform these functions cannot meet the statutory definition of an ATDS. Clarifying this definition (and rejecting earlier expansions that sweep all predictive dialers into the category of "ATDS")[13] is critical to restoring Congress' intent for what constitutes an ATDS. Such a

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[8] *See ACA Int'l*, 885 F.3d at 692 (declaring "the agency's one-call safe harbor...is arbitrary and capricious").
[9] The TCPA prohibits "mak[ing] any call ... using an [ATDS]" to certain telephone numbers, including those assigned to wireless telephone services, absent an exception, such as prior express consent. 47 U.S.C. § 227(b)(1)(A).
[10] 47 U.S.C. § 227(a)(1).
[11] 47 U.S.C. § 227(a)(1)(A)-(B) (emphasis added).
[12] 47 U.S.C. § 227 (a)(l)(A).
[13] In its 2003 TCPA Order, the Commission had determined that, while some predictive dialers cannot be programmed to generate random or sequential phone numbers, they still satisfy the statutory definition of an ATDS. 2003 Order, 18 FCC Red. at 14,091, ¶131 n.432; id. at 14,093 ¶ 133. But as the D.C. Circuit recognized, "at least some predictive dialers, as explained, have no capacity to generate random or sequential numbers." *ACA Int'l*, 885 F.3d at 703.

clarification would help businesses and other legitimate callers by confirming that both elements must be satisfied for a device to constitute an ATDS.

To further remove any confusion, the Commission should also make clear that both functions must be actually-not theoretically-present and active in a device at the time the call is made. The statute uses the present tense to limit the use of equipment that "has the capacity" to perform the ATDS function and makes no reference to "potential" or "theoretical capabilities."[14] Chairman Pai found this "present capacity" or "present ability" approach was compelled by the text and purpose of the statute, the Commission's earlier approaches to the TCPA, as well as common sense.[15] This approach provides a clear, bright-line rule for callers. Callers do not need to worry about whether their calling equipment could perhaps one day be used as an ATDS. Instead, they can focus on what their devices currently do.

The FCC lacks the authority to go beyond the requirements of the clear statutory language. As Chairman Pai noted, the TCPA's restrictions are limited in their applicability to specific equipment; "if the FCC wishes to take action against newer technologies beyond the TCPA's bailiwick, it must get express authorization from Congress—not make up the law as it goes along."[16] Thus, as the D.C. Circuit noted, "[t]he Commission's capacious understanding of a device's 'capacity' lies considerably beyond the agency's zone of delegated authority for purposes of the Chevron framework."[17]

In clarifying which devices qualify as an ATDS, the Commission should hold that devices that require alteration to add auto dialing capability are not ATDS. Rather, the capability must be inherent or built into the device for it to constitute an ATDS. To illustrate, smartphones require downloading an app or changing software code to gain auto dialing capabilities. Those capabilities are not built in. By contrast, other calling equipment can become an autodialer simply by clicking a button on a drop-down menu. That function is already part of the device and requires a simple change in setting rather an alteration of the device. Devices with these inherent capabilities are an ATDS when these capabilities are in use. Adopting this distinction would significantly narrow the range of devices considered ATDS, excluding smartphones, and comport with the statutory language.

The FCC can take this opportunity to clarify that the absence of human intervention is what makes an automatic telephone dialing system automatic. This would clarify an issue on which the Commission has not been consistent. The Commission has stated that the basic function of an ATDS is to dial numbers without human intervention,[18] but later acknowledged that a device might qualify as an ATDS even if it cannot dial numbers without human intervention.[19] The Commission has stated that the impact of human intervention is a "case-by-case determination" based on "how the equipment functions and depends on human

[14] 47 U.S.C. § 227(a)(1).
[15] *See, e.g,* Pai Dissent ("Had Congress wanted to define automatic telephone dialing system more broadly it could have done so by adding tenses and moods, defining it as 'equipment which has, has had, or could have the capacity.' But it didn't.")
[16] Pai Dissent.
[17] *ACA Int'l,*885 F.3d at 698.
[18] *2003 TCPA Order* ¶ 132; *2008 Declaratory Ruling,* ¶ 13.
[19] *Omnibus Order* ¶ 17.

intervention."[20] The FCC declined to provide additional clarity,[21] leaving callers without guidance.

The FCC should make clear that if human intervention is required in generating the list of numbers to call or in making the call, then the equipment in use is not an ATDS. This comports with the commonsense understanding of the word "automatic," and the FCC's original understanding of that word.[22] It also heeds the D.C. Circuit's suggestion that the absence of human intervention is important; a logical conclusion, it found, "given that 'auto' in autodialer- or equivalently, 'automatic' in 'automatic telephone dialing system' - would seem to envision nonmanual dialing of telephone numbers.'"[23] Importantly, it creates a clear rule for businesses to follow and courts to enforce, instead of a vague, case-by-case analysis of each piece of dialing equipment.

B. The Commission Should Find That Only Calls Made Using Actual ATDS Capabilities Are Subject To The TCPA's Restrictions

In the *Omnibus Order*, the FCC applied the TCPA's prohibitions to any call using a device that could be an ATDS, regardless of whether the call was made using ATDS capabilities.[24] In striking down this interpretation, the D.C. Circuit outlined an alternative approach, first raised by Commissioner O'Rielly in his *Omnibus Order* dissent, that was not raised by the petitioners: reinterpreting the phrase "make any call ... using [an ATDS]" as used in the statute.[25] The court suggested that the TCPA's text requires a caller to use the statutorily defined functions of an ATDS to make a call for liability to attach.[26] It also noted that adopting this construction would "substantially diminish the practical significance of the Commission's expansive understanding of 'capacity' in the autodialer definition."[27] Indeed, a device's potential capabilities would not be relevant to determining whether it is an ATDS, because the inquiry will focus only on the functions actually used to make the call or calls in question. This interpretation would ensure that devices that are capable of gaining autodialer functions, such as smartphones, are only subject to the TCPA when used as autodialers.

The FCC should adopt the D.C. Circuit's roadmap and clarify that the TCPA is only implicated by the use of actual ATDS capabilities in making calls. As the court suggested, the TCPA's prohibitions should apply only to calls using ATDS capabilities.[28] Here, a proper interpretation of the TCPA requires the calling equipment "use" ATDS capabilities to make the

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[20] *Id.*
[21] *Id.* ¶ 20.
[22] *2003 TCPA Order*, ¶ 132 ("The basic function of such equipment, however, has not changed- the *capacity* to dial numbers without human intervention.").
[23] *ACA Int'l*, 885 F.3d at 703 (citation omitted).
[24] *Omnibus Order*, ¶ 19 n.70.
[25] *Id.* at 703-704, see also 47 U.S.C. § 227(b)(1)(A) ("It shall be unlawful…to make any call…using any automatic telephone dialing system….").
[26] *ACA Int'l*, 885 F.3d at 704.
[27] *Id.*
[28] *Id.* at 703-704, see also 47 U.S.C. § 227(b)(1)(A) ("It shall be unlawful…to make any call…using any automatic telephone dialing system….").

call. Otherwise, the meaning of "using" would be vastly expanded and untethered from Congress' goals.

Adopting this straightforward reading would ensure that liability attaches only when ATDS capabilities are used to make a call, rather than sweeping in calls made using smartphones, tablets, and other devices that conceivably *could* be modified to support auto dialing via an ATDS. Businesses need this clear guidance, and it would help them avoid unnecessary litigation over whether they used an ATDS when placing calls to their customers. Consistent with the Court's suggestion and the plain text of the statute, the Commission should adopt this interpretation.

III. THE COMISSION SHOULD FIND THAT "CALLED PARTY" UNDER THE TCPA MEANS THE PERSON THE CALLER EXPECTED TO REACH

The Commission's treatment of calls to recycled and wrong numbers, as summarized above, is impractical and irrational. The TCPA excludes from liability calls "made with the prior express consent of the called party."[29] As argued by the Petitioners in *ACA Int'l*, the term "called party" is most naturally read to mean the intended recipient of the call.[30] The Commission, however, had rejected that straightforward interpretation, instead erroneously interpreting "called party" to mean any "subscriber" or "customary user" of the number, even where the caller is not trying to reach that person and has no idea that the number has been reassigned.[31] That reading creates arbitrary results and Russian-roulette liability exposure for callers acting in complete good faith.

A. There Is No Consistently Effective Means of Determining Whether A Number Has Been Recycled

The problem with the FCC's reading of the statute is rooted in this common fact pattern: a consumer provides her wireless phone number to a business and consents to contact at that number, but the consented-to calls or texts end up being received by someone else. This can occur because the consumer mistakenly provided the wrong number. Or, in an increasingly common scenario, the customer may have surrendered her wireless number after she consented to contact at that number. The Commission refers to those abandoned numbers as "recycled" or "reassigned" because wireless carriers reassign them to new subscribers.[32] Carriers recycle almost 37 million phone numbers each year.[33] Even though calls or texts to recycled numbers are often placed through no fault of the unknowing caller, plaintiffs have sued for receiving them on the theory that they were made without the "prior express consent of the called party,"[34] i.e., the new user of the phone number. In the *Omnibus Order*, the FCC arbitrarily endorsed this theory of liability.

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[29] 47 U.S.C. § 227(b)(1).
[30] *See* Pet'rs Br. 39-54.
[31] *Omnibus Order*, ¶¶73-74.
[32] *Omnibus Order*, ¶86 & n.303.
[33] Pai Dissent, 117.
[34] 47 U.S.C. § 227(b)(1)(A)

1. *Restaurants and other businesses have taken numerous steps to address the problems of recycled numbers*

When restaurants attempt to contact their customers, they have no interest in contacting someone else who may have acquired the customer's number. Restaurants and other businesses thus have on their own initiative taken a variety of steps to avoid placing calls or sending texts to numbers that have been shifted to new users, but none is perfect. These approaches include:

- *Stop/Quit Commands.* When restaurants send requested text messages to customers through an automated system, many include a simple instruction telling the customer how to opt out of future messages. For most systems, a "STOP" or "QUIT" response by the phone user directly to a message will end any further communications.[35] Cell phone users are familiar with such basic command responses, and by taking this simple step, a new subscriber can inform the caller that the number no longer belongs to the consenting customer who previously had the number.
- *Pre-recorded opt-out instructions.* Similarly, when a business sends a pre-recorded voice message, many systems will include instructions on opting out.[36] Ending further messages can be as simple as pressing a single key on the recipient-phone's key pad.
- *Periodic verification.* When restaurants have other means of contacting consumers, they may choose to send a periodic email or letter requesting updated contact information. Restaurants and other businesses also typically give customers who maintain online accounts an easy way to update telephone numbers online.
- *Directories.* A limited number of the largest businesses pay for access to databases containing lists of subscriber names and the numbers assigned to them. They then use software to scrub their customer number lists for discrepancies.

2. *All technological and commercial solutions to the problem of recycled numbers are imperfect*

Even with restaurants' best efforts, however, there is no fail-safe solution to the problem of wrong and recycled numbers. Many of the methods, for example, rely on consumers to take the initiative by either providing updated information or informing a caller that it has the wrong number. Many recipients do not do so, as one retailer found out the hard way.[37] The Commission's order incentivizes more such opportunistic behavior.

The record also shows that methods based on subscriber lists and similar sources of information cannot guarantee reliability. At best, such solutions give a "confidence score," or a probability percentage indicating how likely it is that a number still belongs to the consumer that requested notifications.[38]

[35] E.g., Stage Stores, Inc., Petition for Expedited Declaratory Ruling, 3 (June 4, 2014).
[36] E.g., Wells Fargo, Notice of Ex Parte, 3 (May 15, 2014).
[37] *See* Pet'rs Br. 43-44 (recounting experience of Rubio's Restaurant with TCPA plaintiff who intentionally exploited a reassigned number to bring suit).
[38] Wells Fargo, Notice of Ex Parte, 6 & n.33 (July 21, 2014).

Indeed, even the wireless carriers told the Commission that they have "no practical way" to know whether a number has been reassigned, because number portability laws allow customers to take their phone number with them when they switch carriers.[39] That makes it impossible for a single carrier to track who has which number. And, if it is impossible for the carriers, restaurants who are even farther removed from the information should not be expected to do so.

Subscriber-list-based methods, moreover, generate lists of potential reassigned numbers that are both under- and over-inclusive. The Commission acknowledged that the largest database of reassigned numbers includes only 80% of wireless numbers.[40] Moreover, of the active numbers in the database, more than 25% do not include any name associated with the number; the subscriber is listed only as "wireless caller."[41]

And the lists of potential reassigned numbers are over-inclusive because of difficulties accounting for nicknames or shared business or family plans. Often a retailer receives consent to call a customer at a line on a family plan—consent that would be valid for a call under the Commission's rules.[42] Because the line is part of a family plan, however, the wireless carrier may associate a different subscriber name with the number. When a retailer checks its customer list against the carrier's for potential reassigned numbers, therefore, the system is likely to flag that customer's number as a "reassigned" number because of the name mismatch. Yet the number was not in fact reassigned and still belongs to the customer that requested calls from the retailer.

B. The Commission Recognized the Fundamental Problem With Its Approach But Arbitrarily Adopted An Ineffective Solution To It

As explained above, a business operating in total good faith using all available methods to avoid calling "recycled" numbers will unavoidably do so on occasion. And the Commission knows that. It recognized that "callers using the tools discussed above may nevertheless not learn of reassignment before placing a call."[43]

Having identified what it admitted was a "severe" result following from its interpretation of the statute,[44] however, the Commission adopted a supposed solution that does not even come close to solving the problem and ultimately results in the arbitrary imposition of liability. In particular, the Commission fashioned an exemption from TCPA liability for the first call to a wireless number following reassignment.[45] It justified that one-call window on the ground that "the caller *must* have a reasonable opportunity to discover the effective revocation."[46] Yet after

[39] CTIA – The Wireless Association, Comments, 7 (March 10, 2014).
[40] *See Omnibus Order*, ¶86 n.301.
[41] Wells Fargo, July 21 Notice of Ex Parte, 6 n.33.
[42] *Omnibus Order*, ¶73.
[43] *Omnibus Order*, ¶88; *see also, e.g., id.* ¶85 ("[W]e agree with commenters who argue that callers lack guaranteed methods to discover all reassignments immediately after they occur.").
[44] *Omnibus Order*, ¶90 n.312.
[45] *Id.* ¶¶89-90.
[46] *Id.* ¶91 (emphasis added).

that one call—whether or not it yields any relevant information—strict liability follows.[47] The Commission adopted that rule even though the caller will typically not learn that the called number has been reassigned based on that single communication.

1. *The Law Center agrees with the D.C. Circuit's finding that the "one call" exemption is arbitrary*

The Commission's "one-call" window does nothing to alleviate the fundamental problem with the Commission's reading of the statute or afford callers the "reasonable opportunity to discover the effective revocation" the FCC said they must have.[48] The supposed safe harbor is, therefore, itself arbitrary and capricious. The Commission arbitrarily disregarded or down-played evidence demonstrating that a regime allowing liability for the second call or text to a recycled number is irrational for the same reasons as one allowing liability for the first.

As numerous commenters point out, many of the communications that consumers expect from restaurants and other businesses are one-sided and do not involve any direct human interaction.[49] If a consumer asks a restaurant to send her text messages with a weekly coupon, for example, a one-text window likely will not give the restaurant any greater opportunity to discover a reassignment than no window at all. The restaurant will be entirely at the mercy of the receiving party, who is free to choose either to reply "STOP" or to allow the messages to continue and later file suit.[50] Likewise, if a consumer does not answer the phone, then the caller is in exactly the same position after that call as it was before.[51]

2. *None of the FCC's other attempts to ameliorate the unfairness of its rule succeeds*

In an attempt to downplay the problems its reading of the statute would create, the Commission suggested several additional methods for detecting a wrong or reassigned number. But none solves the problem created by the Commission's approach.

The FCC posited that callers can use automated "triple-tone" detection equipment to recognize the message that carriers supply when a disconnected number is called and can then remove that number from their databases.[52] But wireless carriers often reassign numbers before restaurants have a reasonable opportunity to detect that a number has been disconnected. If the first post-recycling call comes after reassignment, as will often be the case, then reliance on "triple-tone" detection equipment will be ineffective.

The Commission also suggested that businesses could address the problem by entering into "contractual obligation[s]" with customers to keep their contact information updated and then

[47] *See id.* ¶72 ("If this one additional call does not yield actual knowledge of reassignment, we deem the caller to have constructive knowledge of such.").
[48] *Id.* ¶91.
[49] *E.g.*, Vibes Media, LLC, Notice of Ex Parte, 2 (June 10, 2015); Abercrombie, Notice, 2; *Omnibus Order*, Statement of Commissioner Michael O'Rielly Dissenting in Part and Approving in Part, 130 ("*O'Rielly Dissent*").
[50] *O'Rielly Dissent*, 131 n.36 (warning that "consumers acting in bad faith" could now "entrap" businesses).
[51] *See ACA Int'l*, 885 F.3d at 707 ("[A] caller's reasonable reliance on the previous subscriber's consent would be just as reasonable for a second call.")
[52] *Omnibus Order*, ¶86 & n.303.

"seek[ing] legal remedies" against the customer "for violation of the agreement[s]."[53] The fact that the FCC made the straight-faced suggestion that businesses should sue their own customers for failure to update their contact information shows just how far afield from commercial realities the agency has traveled when construing the TCPA.

The FCC's adoption of a regime under which callers may be found liable for calls made with a reasonable, good faith belief that the answering party had consented,[54] is particularly irrational in light of callers' incentives separate and apart from the TCPA. Restaurants and other businesses trying to deliver targeted information to their consenting customers have no incentive to call wrong numbers. Instead, they have powerful business reasons to maintain call databases that are as accurate as possible in order to ensure that their own customers—not strangers who inherited the customers' wireless numbers—receive the relevant information.[55] The TCPA and statutes like it are meant to deter conduct that defendants might otherwise choose for business reasons. That rationale for liability is completely inapplicable here, where callers have no business reason to engage in the conduct at issue—and compelling business reasons not to.

IV. The Commission Should Allow For Existing Methods Of Consumer Consent Revocation

The FCC blinded itself to practical realities in another significant respect when it refused to permit businesses to establish uniform procedures for call recipients to follow when revoking consent to be contacted. Instead, the FCC adopted an amorphous standard under which consumers may revoke consent in an unlimited array of ways (provided that such ways meet an undefined "reasonableness" standard) that restaurants and other businesses cannot reliably record and process. To make matters worse, the Commission imposed this entirely new standard in a declaratory order, not notice-and-comment rulemaking, thus depriving businesses of any advance notice of what would be required of them. The result of this procedurally and substantively flawed process will be an increase in TCPA litigation initiated by previously-consenting customers claiming to have revoked that consent.

A. Existing Methods Already Satisfy Consumers' Need for Simple Opt-Out Procedures

No responsible business wants to continue calling or texting a previously-consenting customer after she revokes that consent. Restaurants and other legitimate businesses are harmed, not benefited, if they annoy their actual or potential customers.

Restaurants therefore provide consumers with numerous reasonable methods to stop receiving texts and autodialed or prerecorded calls. As already explained, when restaurants send an automated text message, the message typically contains simple instructions on how to avoid additional messages, e.g., "Reply STOP to stop receiving text messages." When restaurants make a pre-recorded or artificial voice call, those messages generally include instructions for revoking consent for future calls, such as through the simple step of pressing a number on the telephone key pad. And when a customer service representative contacts a customer by

[53] *Id.* ¶86 & n.302.
[54] *Omnibus Order*, ¶93 & n.315
[55] Wells Fargo, July 21 Notice of Ex Parte, 7.

telephone, the representative is typically trained to respond appropriately to requests to stop future calls.

B. There Is No Basis For Allowing Additional Means of Consent Revocation When Reasonable Ones are Already Available

The Commission made no finding that utilizing such straightforward methods of revoking consent burdens consumers. Yet the Commission refused to permit businesses to rely on them. Instead, the Commission determined that callers may not contact a previously consenting consumer after the consumer revokes consent "in *any* manner that clearly expresses a desire not to receive further messages."[56] In so concluding, the Commission rejected requests that callers be allowed to designate specific methods for revoking consent.[57] The FCC likewise declined to promulgate uniform consent-revocation procedures by prospective rule. Instead, the FCC interpreted the TCPA as requiring restaurants and other businesses to have procedures to respond to a revocation made in myriad ways, for example, "orally," "in writing," "by way of a consumer-initiated call," "directly in response to a call initiated or made by" the retailer, or "at an in-store bill payment location."[58] But that list is not exhaustive; restaurants must respond to "any reasonable method" for revocation.[59]

The FCC's "any reasonable method" approach to consent revocation will create serious practical problems for restaurants and other businesses that have established uniform, reliable, and easy-to-use means for allowing consumers to revoke consent. For example, the automated systems that allow consumers to receive the information they want by text "must be pre-programmed to recognize certain words as an opt-out request."[60] Senders of commercial texts have therefore programmed them to recognize and respond to keywords like "STOP," "CANCEL," "UNSUBSCRIBE," "QUIT," "END," and "STOP ALL."[61] Restaurants inform recipients that they may respond with these keywords to opt out of future messages. It is reasonable to expect a consumer wishing to stop receiving texts to text back using one of those specified words—rather than attempting to revoke consent in some other way. Indeed, elsewhere in the Order, the Commission provided that a consumer wishing to stop receiving automated texts containing certain healthcare or financial information may do so only by using "the *exclusive* means" of "replying 'STOP.'"[62] Outside of the narrow context of those particular kinds of communications, however, a text recipient would not be so restrained. Instead, according to the Omnibus Order, she may sign up to receive loyalty program texts one day, through a double opt-in procedure, but then ask to stop communications "in any manner that clearly expresses a desire not to receive further messages,"[63], such as in a conversation with in-store personnel the very next day. A consumer may also attempt to revoke consent by providing a reply text using a potentially endless number of words different from those specified. But automated systems can

[56] *Omnibus Order*, ¶63 (emphasis added).
[57] *Id.*
[58] *Id.* ¶64.
[59] *Id.*
[60] Vibes Media, Notice, 3.
[61] *Id.*
[62] *Omnibus Order*, ¶¶138, 147 (emphasis added).
[63] *Id.* ¶63

respond only to specifically identified combinations of characters, so expecting them to process the entire range of arguably "reasonable" revocation requests—like "pls dont msg me" or "if you send me more texts I'll call a lawyer"—is unrealistic.[64]

The impracticability of the FCC's approach is compounded by the need to accurately make records of all customer-staff interactions so that a retailer could have some hope of proving the absence of a revocation when faced with the inevitable lawsuit.[65] Indeed, it is not far-fetched to imagine a dedicated TCPA plaintiff giving consent, purporting to revoke it in a conversation with a cashier at a retailer, and then filing suit after accumulating enough calls or texts to seek significant damages. In such a situation, the retailer will have limited ability to prove that the oral request did not happen.

V. Conclusion

The Law Center urges the Commission to use the *ACA International* decision as an opportunity to rationalize the dysfunctional TCPA landscape. The FCC should expeditiously resolve legal uncertainty and bring common sense back to the statute by adopting a construction of what constitutes an ATDS that conforms to the statutory language and congressional intent. Petitioners urge the Commission to promptly: (1) confirm that to be an ATDS, equipment must use a random or sequential number generator to store or produce numbers and dial those numbers without human intervention, (2) find that only calls made using actual ATDS capabilities are subject to the TCPA's restrictions, (3) find that the "Called Party" under the TCPA means the person the caller expected to reach, and (4) allow for existing methods of consumer consent revocation. Providing these clarifications of the statutory framework of the TCPA will benefit and bring certainty to the nation's restaurants and foodservice outlets, the consumers they serve, and the millions of people they employ.

Respectfully submitted,

Angelo I. Amador
Executive Director – Restaurant Law Center
Senior Vice President & Regulatory Counsel – National Restaurant Association
2055 L Street, NW
Washington, DC 20036
P: 202-331-5913
Email: aamador@restaurant.org

[64] See Vibes Media, Notice, 3.
[65] *See* American Financial Services Association, Comments, 2 (Sept. 2, 2014).